

of the party in whose favour the writ is conceived : upon which principles stand the greatest securities in the nation ; for, *est* at some merchants in Glasgow heard a transient communing betwixt the parties some weeks before the closing of the bargain by entering into writ, what can that import ? seeing many projects of commerce are contrived amongst merchants which never take effect, but by posterior treaties and communings are cast into new shapes ; so that to prove loose talkings and projects may be dangerous, they never proceeding on that foot, but come afterwards to be wholly altered. And as to the insurance, whatever it might operate against sea-hazard, by storm and shipwreck, fire or piracy, yet it can never extend to insure against the infidelity of the supercargo, who disposed on the ship and goods without warrant.

The Lords refused to examine extraneous witnesses, (for *non constat* they were commurers,) but allowed the writer and instrumentary witnesses to be examined, before answer, as to the parties' meaning ; and allowed them to prove that the ship was sold in the plantations, and that the price and effects were remitted to England or Scotland, to the effect they might the better judge, when they had the whole matter before them, whether the condition of the obligation was purified or not.

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See the subsequent part of this Report, *infra*, 2d December 1707.

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1706. *January 11.* GRAY of BALGOWNY *against* BAILIE HOG and THOMAS BENNET in Dalkeith.

BALGOWNY having a park lying near Dalkeith, wherein it was supposed there was a coal, he sets a tack, both of the park and coal, to Hog and Bennet, and they oblige themselves to pay 2000 merks of tack-duty for a year ; and he having charged on the tack, they suspend on this reason, That the principal subject set to them was a coal to be wrought only by ten colliers, which supposes there behoved to be a coal there ; but, *ita est* there was no such workable coal in that ground ; but, on the contrary, they were at great expense in boring and working, and could find none but only a face of a coal half a foot thick, and which presently ended, having neither back nor following. . And it is a principle in location, that there must be *res locata*, otherwise the *merx* or *pretium* cannot be due, which is given for the use and profit of the thing set ; and, if that fail, or be not extant, then the hire cannot be demanded from the conductor, *qui pensionem solummodo præstat pro usu rei* ; and in case of sterility, inundation, vastation by war, or the like, hindering the tacksman's fruition of the subject, the heritor can get no rent. And it choaks the sense of mankind to pay for a coal, when it cannot be made appear that there was any coal there ; which were to establish iniquity by a law, even as if one should exact a price for a thing he neither did nor could deliver to the buyer ; and the common law was clear on this head, *sec. 5. institut. De Locat. et Conduct.* seeing the use and possession of the thing set and the tack-duty are mutual and correlative, so that, *uno sublato, tollitur et alterum.*

ANSWERED,—The tack is opposed, bearing it was a going coal ; and you, dwelling so near it, had occasion to both see it and inform yourself of its condition, and your eye was your merchant ; for there is a great difference betwixt subjects

affording a fixed and determinate profit, (as lands do,) or such as depend on many events, accidents, and chance; as coal, salt, salmon-fishing, gables, and customs, and all other casual rents, which are capable of alteration every day. Now, where parties hire such things, they are certainly understood to take their hazard, like one who buys a *jactus retis*, though no fish be drawn, yet he must pay what he pactioned: even so, where I take a salmon fishing, though they should all withdraw and desert that place, and go to another river, I will still be liable, because I took it *cum periculo*. Yet, see the *Town of Berwick's case* against *Riddel of Haining*, 1st June 1661; and the *Heritors of Southesk water*, complaining on the *Town of Brechin's damdyke* hindering the fishes to swim up the river. And the same will hold on a tack of customs; though they fail, yet the duty may be claimed. And the law seems to favour this, l. 6 and 25, sec. 2; l. 15, sec. 2 and 5, *D. Locati*; and l. 78, *D. de Contr. Empt.* where Bartolus, Gomezius, and others determine, *si quæ vitia ex ipsa re oriantur, ea damno coloni esse*, but not where they are from extrinsic accidents.

The *second* reason of suspension was founded on the clause of absolute warrandice in the tack, which presupposes his obligation *carbones ibi subesse*. ANSWERED,—The warrandice imports no more but that Balgowny was proprietor of the ground, and that none should interrupt or disturb them in working of the coal.

The *third* reason was, That the tack-duty was promiscuously both for the grass and the coal; and so, *esto* the coal failed, they are still liable. ANSWERED,—The profit of the grass is very inconsiderable, and not worth £100 of the tack-duty, which was mainly given in contemplation of the coal; and the grass but falls as a consequent thereof,—like the shadow of the ass hired at Athens, where the master pretended to a distinct hire, because he had set the ass, but not its shadow: and the suspenders are willing to pay whatever value the grass of the park shall be proven to be worth.

The *fourth* reason was, That, finding themselves disappointed of the coal, they delivered back the keys of the park to the charger's lady; which she accepted and took off their hands.

ANSWERED,—Balgowny was then absent in the north when they took this advantage, and she had no power nor commission for it.

The Lords considered the like case had occurred betwixt my Lord *Edmiston* and Mr *John Preston*, marked by Dirleton, 13th January 1675, about a coal-set, which was rendered unprofitable to the tacksmen by the damps of ill air, the falling in of the roof, &c. which though extrinsic accidents, and not arising *ex natura rei*, yet the Lords took trial before answer, allowing a joint probation anent the condition of the coal and its impediments: and followed the same course here, to try if ever there was a going coal, and what endeavours and diligence thir tacksmen used either to find or recover it; and to prove what the worth and value of the grass would be by itself, abstracted from the coal, and anent the delivering back of the keys.

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1706. January 18. DANIEL CAMPBELL against SIR ALEXANDER ANSTRUTHER of NEW WARK.

LORD Crocerig reported Daniel Campbell, collector at Port-Glasgow, against